

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
13,503-s76H BY CLARENCE H. LEISTER)

The Proposed Findings of Fact, Conclusions of Law, and Order as entered by the Hearing Examiner on April 16, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law, and Order.

FINAL ORDER

Application for Beneficial Water Use Permit No. 13,503-s76H by Clarence H. Leister is hereby denied.

RECOMMENDATION

It is recommended that persons diverting water from the Thayer Ditch and its laterals construct a proper headgate at the point where water is diverted from Mill Creek into the Thayer Ditch.

Regarding new appropriations from the Thayer Ditch; the Department can only grant a permit to appropriate water from a source of supply, in this case, Mill Creek. Without a proper diversion structure on Mill Creek, the amount of water flowing down the Thayer Ditch cannot be regulated to protect prior downstream rights on Mill Creek.

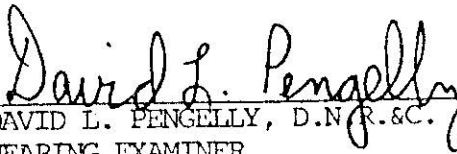
NOTICE

The Hearing Examiner's Final Order may be appealed in accordance

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1 with the Montana Administrative Procedures Act by filing a petition in
2 the appropriate court within thirty (30) days after service of the Final
3 Order.

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5 DATED this 2nd day of May, 1980.

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8 DAVID L. PENGELLY, D.N.R.&C.
9 HEARING EXAMINER
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CASE # 13503

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 13,503-s76H BY CLARENCE H.)
LEISTER)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on February 5, 1980, in the Council Chambers of the Missoula City Hall, Missoula, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 13,503-s76H, David Pengelly, Hearing Examiner, presiding.

The hearing on this matter was held concurrently with the hearings on Application for Beneficial Water Use Permit No. 15,150-s76H by Jim and Ethel Prelat and Application for Beneficial Water Use Permit No. 18,860-s76H by Maurice and Sonja O'Connor. Mr. and Mrs. O'Connor were represented by legal Counsel, Mr. Chris Swartley, Missoula, Montana.

The Applicant, Clarence H. Leister, appeared at the hearing and presented testimony in support of the Application. Mr. Leister was not represented by legal counsel. No exhibits were introduced supporting the Application.

Eight (8) Objectors were present at the hearing: Mr. William J. Blair, Mrs. Marie E. Greydanus Mrs. Richard Jochinsen, Mr. William D. Lane, Mr. William E. Mytty, Mrs. Sue Umstead, Mr. Gene Whitaker and Mr. Tony Zens. Messrs. Blair, Mytty and Zens were represented by legal Counsel, Mr. George Goodrich, Missoula, Montana. Mr. Goodrich also represented Mr. and Mrs. Eric Skibsted, who were not present at the hearing. Mrs. Greydanus was represented by Counsel, Mr. John F. Patterson,

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1 Missoula, Montana. The Montana Power Company objected to Application
2 No. 13,503-s76H but was not represented at the hearing.

3 Those testifying against Application No. 13,503-s76H were Mr.
4 Blair, Mr. Goodrich (on behalf of his clients), Mr. Mytty, Mr. Whitaker
5 and Mr. Zens.

6 Mr. Whitaker introduced three (3) exhibits supporting his objection,
7 to wit:

8
9 Objector's Exhibits:

10 O-1 Photographs (11) depicting diversions and uses of water along
11 the Thayer Ditch.

12 O-2 Assignment of Contract for Deed

13 O-3 Permission to Assign Contract for Deed

14 The Objector's Exhibits were marked accordingly and received into the
15 record without objections.

16 Montana Department of Natural Resources and Conservation personnel
17 present and testifying on behalf of the Department were: Larry Brown,
18 Hydrologist; Arlin Krogstad, Hearing Representative; and Jan Mack,
19 Missoula Water Rights Bureau Field Office Manager. Also present was
20 Vicki Woodrow, Hearing Recorder. The Department was not represented by
21 legal counsel. Two (2) exhibits were introduced by the Department, to
22 wit:

23
24 Department's Exhibits:

25 D-1 Plat map showing location of Applicant's and Objectors'
26 properties

27 D-2 Copy of map from Missoula County Water Resources Survey, part
28

1 2, page 5, showing location of irrigated lands and irrigation
2 ditches.

3
4 The Department's Exhibits were marked accordingly and received into the
5 record without objection.

6
7 MOTION

8 At the Pre-hearing Conference held on November 8, 1979, a motion
9 was made by Mr. George Goodrich, Counsel for several objectors, to deny
10 the Application since the Department had not acted on the Application
11 within the 180 day time limit set under the Montana Water Use Act (85-2-
12 310, MCA, 1979). Motion by Counsel is denied since the purpose of
13 Section 85-2-310 is to protect an Applicant from inaction by the Department,
14 not Objectors.

15 SUMMARY OF RECORD

16 1. On June 20, 1977, the Department received Application for
17 Beneficial Water Use Permit No. 13,503-s76H by Clarence H. Leister, to
18 appropriate 25 gallons per minute of water, not to exceed 2 acre-feet
19 per annum from Mill Creek, a tributary of Iolo Creek, in Missoula County,
20 Montana. The water is to be diverted from Mill Creek by means of a pump
21 at a point in the SW1/4 NW1/4 NE1/4 of Section 3, Township 11 North,
22 Range 21 West, M.P.M., and used for new irrigation on one (1) acre, more
23 or less, in the SW1/4 of Section 35, Township 12 North, Range 21 West,
24 M.P.M., from April 1 to October 30, inclusive, of each year.

25 2. On May 24 and 31, and June 7, 1978, the Department caused to be
26 duly published in the Missoulian, Missoula, Montana, notice of Application
27 for Beneficial Water Use Permit No. 13,503-s76H.

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1 3. On June 23, 1978, the Department received an objection to the
2 above Application from The Montana Power Company.

3 4. On June 29, 1978, the Department received objections to the
4 above Application from George Goodrich on behalf of William J. Blair and
5 M. June Blair, William E. Mytty Jr. and Sandra F. Mytty, Eric Skibstead
6 and Betty B. Skibstead, and Tony Zens.

7 5. On March 12, 1979, the Application was revised downward from 25
8 gallons per minute to 10 gallons per minute and from 2 acre-feet to 1
9 acre-foot and the period of diversion was changed from April 1 to
10 October 30, inclusive, to April 1 to September 1, inclusive.

11 6. On December 13, 1979, Mr. Gene Whitaker was admitted by the
12 Hearing Examiner as an untimely Objector to the above application.

13 7. Mr. Leister testified that water flows by his place and is then
14 used by Mr. Lane. He stated that he does not feel that his use of water
15 will affect Mr. Lanes's water right (Mr. Lane did not object to the
16 above Application). Under cross-examination by Mr. Goodrich, Mr. Leister
17 testified that he doesn't know if there are any unappropriated waters
18 available in the source of supply. Under cross-examination by Mr.
19 Krogstad, Mr. Leister testified that his proposed point of diversion is
20 the Thayer Ditch where it comes off Mill Creek and that he proposes to
21 divert water from the Thayer Ditch by means of a "one (1) horse pump"
22 that will handle three (3) sprinkler heads with a one (1) inch hose.
23 Mr. Leister testified that he does not own the land at the point where
24 the Thayer Ditch diverts water from Mill Creek, and that there are no
25 headgates or measuring devices at that point of diversion. Mr. Leister
26 stated that he does not know how much water is coming down the ditch or
27 how prior rights would be satisfied. Mr. Leister stated that his only
28 means of measuring the amount of water diverted would be the output of

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1 the pump he intends to use. Mr. Leister did not know the capacity of
2 his pump. Mr. Leister testified that Mr. Lane is the only water user
3 below him, and since Mr. Lane doesn't use all of the water coming down
4 the Thayer Ditch, that he feels water is available for appropriation.
5 Mr. Leister stated that if the water is available, he could use the full
6 amount that he applied for, although he could get by with less than the
7 full amount by only watering his garden and not his lawn.

8 8. Mr. Whitaker, an Objector; testified that he owns 20.4 acres
9 for which he has a five (5) inch high water right to be used on 10.4
10 acres to be delivered through the Thayer Ditch. Mr. Whitaker further
11 testified that for seven (7) summers he has cleaned and rebuilt ditches
12 from the Mill Creek drainage down through the Thayer Ditch. Mr. Whitaker
13 further testified that in the seven (7) summers he has lived in the
14 area, there has been no water, high water, or excess water after about
15 the first of September, and he has lost crops all seven years due to a
16 shortage of water. Under cross-examination by Arlin Krogstad, Mr.
17 Whitaker testified that he diverts water from the end of April to approximately
18 September 15.

19 9. Mr. George Goodrich testified on behalf of his clients, Mr.
20 Zens; Mr. and Mrs. Mytty; Mr. and Mrs. Blair; and Mr. and Mrs. Skibsted.
21 His clients possess water rights which were decreed in June of 1937 in
22 the Case of Warden vs. Anderson in Cause No. 12336, Missoula, County,
23 Montana. Mr. Zens has a decreed right from Mill Creek with a priority
24 date of June 1, 1886 for a total flow of 100 miner's inches. Mr. Blair
25 and Mr. Mytty share a decreed right for 67 1/2 miner's inches from Mill
26 Creek, also with a priority date of June 1, 1886. Mr. Goodrich further
27 testified that the primary basis of his clients objections to this
28 Application is that there are no unappropriated waters in Mill Creek.

1 Mr. Goodrich testified that his clients feel that the Applicant has a
2 sufficient portion of the 40 inch Thayer right and that his clients
3 object to the issuance of any further permits for the appropriation of
4 water from Mill Creek.

5 10. Mr. Zens testified that there are 207 1/2 inches of decreed
6 water and that any water in excess of this decreed water is considered
7 high water. Mr. Zens stated that he's been using water since 1950, a
8 period of 30 years, and that he has a good understanding of when the
9 water is high and when it is low. He stated that generally there's high
10 water for approximately one (1) month and then there is usually another
11 month in which there is sufficient water to satisfy decreed rights, but
12 towards the end of July, there's only about 100 inches of water left in
13 the whole creek. Mr. Zens stated that by the end of July, generally
14 there is not sufficient water in the creek to satisfy the decreed rights
15 and that out of the 100 inches of water that may be available, he and
16 Mr. Blair and Mr. Mytty only receive about 50 inches of that water even
17 though their right says that they are entitled to 167 1/2 inches. Mr.
18 Zens stated that he and Mr. Blair and Mr. Mytty start using the water in
19 April and use it at least until the end of August and maybe even into
20 September. Mr. Zens stated that he irrigates about 50 acres of cropland
21 and when water is available he irrigates some pastureland also.

22 11. Mr. Mytty testified that he and Mr. Zens and Mr. Blair all use
23 the same point of diversion from Mill Creek. They have a headgate off
24 of Mill Creek which drops the water into a cistern and from there they
25 divert out of the cistern with a pipe into their irrigation systems.
26 Mr. Mytty stated that although they do use water from April to August
27 for irrigation, that they (Messrs. Zens, Mytty and Blair) also water
28 stock using this water right so that the period of use is even longer

1 than that stated by Mr. Zens. Mr. Mytty stated that he irrigates about
2 45 acres.

3 12. Mr. Blair testified that he irrigates 18 acres of land.

4 13. Under cross-examination by Chris Swartley, Larry Brown testified
5 that he measured the flow in Mill Creek on August 13, 1979. Mr. Brown
6 testified that at the time he measured the flow in Mill Creek, there was
7 more water flowing down the Thayer Ditch than down the central channel
8 of Mill Creek. Mr. Brown did not observe whether there was any water
9 flowing into Lolo Creek from Mill Creek at that time.

10
11 PROPOSED FINDINGS OF FACT

12 1. The Applicant presented no evidence that there are unappropriated
13 waters in the source of supply at times when the water can be put to the
14 use proposed by the Applicant, in the amount the Applicant seeks to
15 appropriate, or that throughout the period during which the Applicant
16 seeks to appropriate, the amount requested is available (underlined for
17 emphasis).

18 2. The Applicant presented no evidence that the rights of prior
19 appropriators would not be adversely affected.

20 3. The Applicant presented no evidence to show that the proposed
21 means of diversion or construction are adequate. The Applicant stated
22 that there is no control structure at the proposed point of diversion
23 from Mill Creek, which is the source of supply.

24 4. The proposed use of water is a beneficial use.

25 5. The proposed use will not interfere unreasonably with other
26 planned uses or developments for which a permit has been issued or for
27 which water has been reserved.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states that "The Department shall issue a permit if:

1. there are unappropriated waters in the source of supply:
 - a. at times when the water can be put to the use proposed by the applicant;
 - b. in the amount the applicant seeks to appropriate; and
 - c. throughout the period during which the applicant seeks to appropriate, the amount requested is available;
2. the rights of a prior appropriator will not be adversely affected;
3. the proposed means of diversion or construction are adequate;
4. the proposed use of water is a beneficial use;
5. the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; . . ."

2. Based on the record (testimony presented at the hearing and information in the Department's file) it is concluded that there are no unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate, or throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

3. Based on the record, it is concluded that the rights of prior appropriators would be adversely affected if this permit were issued.

4. Based on the record, it is concluded that the proposed means of diversion or construction are not adequate.

1 5. Based on the record, it is concluded that the proposed use of
2 water is a beneficial use.

3 6. Based on the record, it is concluded that the proposed use will
4 not interfere unreasonably with other planned uses or developments for
5 which a permit has been issued or for which water has been reserved.

6 Based on the Proposed Findings of Fact and Conclusions of Law, the
7 following Proposed Order is hereby made:

8
9 PROPOSED ORDER

10 Application for Beneficial Water Use Permit No. 13,503-s76H by Clarence H.
11 Leister is hereby denied.

12 RECOMMENDATION

13 It is recommended that persons diverting water from the Thayer
14 Ditch and its laterals construct a proper headgate at the point where
15 water is diverted from Mill Creek into the Thayer Ditch.

16 Regarding new appropriations from the Thayer Ditch; the Department
17 can only grant a permit to appropriate water from a source of supply, in
18 this case, Mill Creek. Without a proper diversion structure on Mill
19 Creek, the amount of water flowing down the Thayer Ditch cannot be
20 regulated to protect prior downstream rights on Mill Creek.


21
22 NOTICE

23 This Proposed Order is offered for the review and comment of all
24 parties of record. The review and comment period shall commence with
25 the receipt of this Proposed Order and shall end ten (10) days thereafter.
26 No extensions of time for comment will be granted.

27 The Final Order in this matter will be sent to all parties by
28 certified mail.

1 The Hearing Examiner's Final Order may be appealed in accordance
2 with the Montana Administrative Procedures Act by filing a petition in
3 the appropriate court within thirty (30) days after service of the Final
4 Order.

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6 DATED this 16th day of April, 1980.

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9 DAVID L. PENGELLY, D.N.R.&C.
10 HEARING EXAMINER
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